

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: § CASE NO. 23-90020-11
§ JOINTLY ADMINISTERED
SERTA SIMMONS BEDDING, LLC, § HOUSTON, TEXAS
ET AL, § THURSDAY,
§ MAY 18, 2023
§ 12:35 P.M. TO 1:51 P.M.
DEBTORS. §

SERTA SIMMONS BEDDING, LLC, § CASE NO. 23-09001-ADV
ET AL § JOINTLY ADMINISTERED
§ HOUSTON, TEXAS
VERSUS § THURSDAY,
§ MAY 18, 2023
AG CENTRE STREET PARTNERSHIP, §
ET AL § 12:35 P.M. TO 1:51 P.M.

CONFIRMATION DAY FOUR -- AFTERNOON SESSION (VIA ZOOM)

BEFORE THE HONORABLE DAVID R. JONES
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES: SEE NEXT PAGE
COURTROOM DEPUTY: VRIANA PORTILLO

(Recorded via CourtSpeak)

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1 **HOUSTON, TEXAS; THURSDAY, MAY 18, 2023; 12:35 P.M.**

2 THE COURT: -- under Case No. 23-90020, Serta
3 Simmons Bedding, LLC, et al, as well as the associated
4 adversary proceeding.

5 Mr. Ehrlich, your final witness.

6 MR. EHRLICH: Yes, Your Honor. The Ad Hoc Group
7 of Excluded Lenders calls Michael Hanigan.

8 THE COURT: All right. Mr. Hanigan, if you'd
9 please come forward?

10 Good afternoon. Come right on up here. And if --
11 before you take your seat, if you'd raise your right hand,
12 please, sir.

13 MICHAEL HANIGAN, EXCLUDED LENDERS' WITNESS, SWORN

14 THE COURT: Thank you, sir.

15 MR. EHRLICH: May I approach, Your Honor?

16 THE COURT: Certainly. Thank you.

17 (Pause in the proceedings.)

18 MR. EHRLICH: Okay. You all set, Mr. Hanigan?

19 THE WITNESS: I'm all set.

20 MR. EHRLICH: Great.

21 DIRECT EXAMINATION

22 BY MR. EHRLICH:

23 Q Can you please introduce yourself to the Court?

24 A I'm Michael Hanigan.

25 Q And where are you from, Mr. Hanigan?

1 A I actually grew up here. I grew up in Northwest
2 Houston. I went to school at the University of Texas at
3 Austin.

4 Q And what's your degree in?

5 A I have a bachelor in business administration with a
6 major in finance.

7 Q And where did you go to work after you graduated from
8 UT?

9 A After UT I worked at investment bank called Moelis and
10 Company in New York.

11 Q And where'd you go from Moelis?

12 A After Moelis I started at Gamut in January 2017.

13 Q And you've been there continuously since?

14 A Ever since.

15 Q And what's your role at Gamut?

16 A I'm a principal.

17 Q And can you explain to the Court what it is that Gamut
18 does?

19 A Sure. So we are a New York-based private equity firm.
20 The core of what we do is a private equity firm, so we buy
21 and sell companies and manage those companies as --

22 (Electronic noise.)

23 THE COURT: My fault. I forgot to turn that back
24 down.

25 Let's see. Your voice carries, so give me just a

1 second.

2 Shouldn't do that anymore, my apologies.

3 THE WITNESS: Okay.

4 So, yeah, we are a New York-based private equity
5 firm at our core. We make value-oriented investments. But
6 we do a flexible mandate, which means we can make
7 investments across the capital structure.

8 BY MR. EHRLICH:

9 Q And roughly what portion of Gamut's investments are
10 what we would think of as traditional private equity
11 investments?

12 A The vast majority are traditional private equity-
13 controlled investments.

14 Q And does Gamut also from time to time invest in debt
15 securities --

16 A We do.

17 Q -- or leverage loans?

18 A Yeah.

19 Q And as a principal, I should have asked you this,
20 Mr. Hanigan, what's your role?

21 A So my role is broad, but it's really overseeing all
22 aspects of the investment execution and management, so
23 everything from the underwriting to the monitoring to the
24 continuing management of the investment.

25 Q Now, with respect to Gamut's debt investments, do you

1 participate in those type of investments as well?

2 A I do.

3 Q And does Gamut have any particular investment
4 philosophy vis-à-vis buying leverage loans or debt?

5 A Our investment philosophy is we first look for good
6 companies. You know, we need to first make sure that
7 they're structurally sound companies that have long-term
8 value that's still intact. So that's the first thing that
9 we look for.

10 A lot of times the companies that we are investing in
11 in the secondary credit markets are companies that are
12 undergoing some short-term issues and maybe have excess
13 leverage on their balance sheets.

14 Q And were you personally involved in -- well, let me ask
15 you this: Did Gamut acquire Serta first lien loans?

16 A We did.

17 Q And were you personally involved in those acquisitions?

18 A Yes.

19 Q And when did Gamut begin to purchase first lien loans?

20 A December 2018.

21 Q And why did Gamut begin to purchase Serta first lien
22 loans in late 2018?

23 A So it kind of goes back to the fundamentals of what we
24 look for in a credit investment. First, we look for a good
25 business. You know, I think when we were looking at Serta,

1 we first saw that it was undergoing a lot of short-term
2 headwinds. I think some of it was industry-driven by some
3 disruption in some of the new entrants to the space. And
4 some of it was also mismanagement we identified.

5 But once we did our diligence, we determined that the
6 long-term value proposition of the company remained intact,
7 had very well-recognized brands. It had the strong free
8 cash flow proposition. And so that's what was important to
9 us to first identify.

10 Now, the opportunity to buy into the capital structure
11 was because the company itself had excess leverage on its
12 balance sheet which was the result of a 2016 dividend that
13 the sponsor took out.

14 Q Now, as you're considering whether or not to buy Serta
15 first lien debt, did you have an underwriting process that
16 you used?

17 A Yes.

18 Q And what did that entail? And just at a general level.

19 A Sure. So part of it was the business diligence aspect
20 and understanding the fundamentals of the business.

21 The other was understanding where our investment could
22 go. You know, I think our first priority is understanding
23 what the returns would be if we got paid back our principal
24 at maturity. You know, that has to make sense for us
25 because there's a very high likelihood that that could

1 happen. So that is one outcome we would be underwriting to.

2 The other outcome is the scenario, especial because
3 we're a passive debt holder, we don't know where the company
4 is going to go, there's a scenario where the company can't
5 pay back its obligations. So, you know, for us it was
6 important to be a first lien lender because if the company
7 couldn't pay back its obligations, we wanted to ensure that
8 we would be first in line.

9 Q Now, do you model when you do your underwriting any
10 kind of various scenarios for outcomes?

11 A We do.

12 Q And when you acquired Serta debt did you model
13 different potential scenarios of outcomes?

14 A Sure. We would have looked at getting paid back our
15 principal at maturity. We would have looked at us owning
16 the business through a restructuring where the company
17 couldn't pay us back. You know, I think that's one of the
18 outcomes. We would have been happy with all outcomes.

19 For us, the reason we're comfortable with the scenario
20 where the company can't pay back what's owed is because,
21 like I said, we are a private equity firm. A lot of what we
22 do is we own businesses.

23 A lot of the businesses that we buy into need to be
24 turned around. So we have the operational expertise to turn
25 businesses around to reduce leverage from its balance sheet.

1 So it's an outcome that we were comfortable with.

2 Q And when you were doing your diligence and underwriting
3 on Serta, did you manage -- did you model potential
4 liability management transactions?

5 A Yes. One of the things that we would always do, and we
6 did in this case, is we would review the credit agreement
7 alongside external counsel and review it holistically.

8 But I think one of the things that would be important
9 for us to understand is the sizes of the baskets that are
10 allowed, the investment basket capacities, and the
11 indemnities basket capacities in particular. Those are
12 things that, you know, we're aware of because we participate
13 in the credit markets, not just on buying debt or lending to
14 companies.

15 But also we're a frequent borrower when we own these
16 businesses. So one of the things we looked at was
17 quantifying the basket capacities to understand the risk
18 that the company could pursue a liability management
19 transaction where assets moved and debt was raised.

20 Q Let me just unpack something that you just said there,
21 Mr. Hanigan. You said that Gamut is a frequent borrower.
22 Is that because -- does Gamut own companies that enter into
23 leverage loan agreements?

24 A Yes.

25 Q And do you and your colleagues at Gamut participate in

1 the negotiation of those agreements with prospective
2 lenders?

3 A Yes.

4 Q Now, did you in connection with Serta in particular
5 model any particular types of liability management
6 transactions or think about the possibility those might
7 happen?

8 A Yeah. The main liability management exercise we
9 modeled to understand what the impact would be to our
10 investment would be the movement of assets and the raising
11 of debt as allowed under the baskets that were written in
12 the credit agreement.

13 Q Now, you're aware that in June of 2020 the company
14 entered into what I'll call a priming uptier transaction,
15 right?

16 A Yes.

17 Q And was that something that you modeled as you were
18 doing your diligence in the fall of 2018?

19 A No.

20 Q Why not?

21 Q You know, I think we went into this, like I said,
22 thinking about different outcomes. One is getting paid
23 back, one is owning the business because they can't pay us
24 back.

25 What was critical to us was being a first lien lender.

1 We weren't buying into the second lien term loan because it
2 was important for us to be first in line with the rest of
3 our class to own the business if we couldn't get paid back.

4 What we didn't model out or ever expect was that within
5 our class, there would be certain lenders who were chosen to
6 get paid before us because fundamentally important to us was
7 being first in line. So, you know, when we got moved to
8 last in line, it was unexpected. We had never heard of a
9 transaction that happened like that. And it was fundamental
10 -- against the fundamentals of our investment pieces.

11 Q Now, Gamut purchased additional Serta Simmons debt
12 after -- excuse me. Did Gamut purchase additional Serta
13 Simmons debt after late 2018?

14 A Yes.

15 Q And did it did -- did it do so into 2020?

16 A Yeah, throughout 2019 and into 2020.

17 Q So let's jump ahead to 2020. After the onset of the
18 COVID-19 pandemic in March of 2020, how, if at all, did your
19 view of Serta Simmons change?

20 A The near term dynamics were obviously much different.
21 There was a ton of uncertainty in Serta Simmons and, you
22 know, every other business. And I think the medium term
23 outlook was also uncertain. The company continued to
24 struggle.

25 For us, though, we continued to believe in the

1 long-term value proposition of the business. So we were
2 still comfortable that that was still there and it was still
3 a good investment for us to make.

4 Q If I could -- I put a small binder in front of you,
5 Mr. Hanigan. If I could ask you to look at Tab 4 there?

6 MR. EHRLICH: Mr. Carlock, it's Debtor's
7 Exhibit 34, ECF 861-28 on the main Docket.

8 BY MR. EHRLICH:

9 Q Do you recognize this email, Mr. Hanigan?

10 A Yes.

11 Q And it was from you to an individual named Jordan Zaken
12 (phonetic) and an individual named Michael Krieger
13 (phonetic); you see that.

14 A Yeah.

15 Q And who is Mr. Zaken?

16 A He's a cofounder of Gamut.

17 Q And who is Mr. Krieger?

18 A He's a partner at Gamut.

19 Q And was this the core deal team for the Serta Simmons
20 investment at Gamut?

21 A Yes, at this time.

22 MR. EHRLICH: Your Honor, I would offer
23 Debtor's 34.

24 THE COURT: Any objection?

25 MR. RUZINSKY: No objection.

1 THE COURT: All right. Thank you.

2 It's admitted.

3 (Exhibit 34, ECF 861-28 received in evidence.)

4 BY MR. EHRLICH:

5 Q Now, Mr. Krieger [sic], if I could direct your
6 attention to the full paragraph in the middle of the page,
7 it states, "The existing sponsors re-levered the business in
8 2016 to pay a distribution, saddling the business with an
9 unsustainable capital structure in the face of an ever
10 competitive retail environment. For Gamut, this is a
11 classic DFC opportunity: good company, bad balance sheet."

12 Do you see that?

13 A Yep.

14 Q How does that relate to the investment pieces that you
15 shared with us earlier?

16 A So this is really summarizing in a few words what I
17 went into more detail. Good company, we liked the brands,
18 we thought that over the long term the company could
19 continue to succeed. But the balance sheet was an issue.
20 They had way too much debt. I think it actually impacted
21 the way they were operating the business. And so those were
22 the two dynamics that we looked for more broadly in our DFC
23 strategy and what we saw here.

24 Q And can you explain to the Court what is meant by DFC?

25 A Sure. So DFC, it stands for "Distressed For Control."

1 It's a bit of a misnomer. It really just is an acronym for
2 how we approach the debt markets. It's not that we'll
3 always get control of a business. Actually, oftentimes we
4 get paid back our principal. But it is a possibility that
5 we could end up as a controlling stakeholder of the
6 business.

7 Q Now, with respect to Serta Simmons, what was at the end
8 of the day the maximum investment that Gamut made in the
9 first lien?

10 A We ultimately held \$161 million of face value of debt.

11 Q And do you know the size of the first lien tranche
12 prior to the June, 2020 transaction?

13 A About 1.9 billion.

14 Q So was Gamut seeking to acquire a controlling position
15 in the -- even if there was an equitization of the 1-L?

16 A No. We never would have been able to.

17 Q Now, at this point in time, though, was a restructuring
18 in your view likely?

19 A At this time it was certainly more likely than
20 pre-COVID.

21 Q Let me direct your attention to, I guess, the third
22 from the -- or fourth from the bottom line. It states, "The
23 likelihood of a near term restructuring, which is a
24 meaningful positive to our investment these -- I think it
25 probably means thesis -- has increased dramatically to also

1 a certainty. The current creation value for the business is
2 an exceptional discount to historical transaction levels and
3 public comparables."

4 Can you explain to the Court what's intended here?

5 A Sure. So where the two outcomes are, you can get paid
6 back at maturity or you can get control of a business when
7 they can't pay you back at maturity.

8 One of the risks that we had grappled with for a while
9 was the maturity here wasn't until 2023, and we were talking
10 about this in 2020. And the company continued to struggle.
11 You know, I think part of the issue was the company had too
12 much debt and it was doing unnatural things to manage that
13 debt load.

14 And we were concerned that over the next few years,
15 before it reached a maturity, there may be things that the
16 company may do, like fire employees, close facilities,
17 impact product quality, that could actually deteriorate the
18 long-term value of the business that was important to us.
19 So if there was a near term restructuring, we could kind of
20 take control of the destiny of the business.

21 Q Now, at some point in early 2020, did you learn that
22 Serta was soliciting proposals to help it with its liquidity
23 problems and its balance sheet?

24 A Yes.

25 Q And was Gamut part of a group that made a proposal to

1 the company?

2 A Yes.

3 Q And who did you work with?

4 A As part of our group was Angelo Gordon and Apollo. And
5 then our advisors were PJT and Paul Weiss.

6 Q And how did it come to be that you worked with Angelo
7 Gordon and Apollo?

8 A Angelo Gordon originally reached out to us informally,
9 both as first lien debt holders. And then Apollo ultimately
10 also entered into our informal group as another holder.

11 Q And did the informal group at some point become a
12 formal group?

13 A Yes.

14 Q And did your group, in fact, make a proposal to Serta
15 Simmons?

16 A Yes.

17 Q And do you recall at a high level what the components
18 of that were?

19 A Sure. So there were a few parts of it. One was
20 providing the company more liquidity, which was something
21 that I understood was important to the company. So we were
22 providing a new money investment.

23 We were also moving assets as allowed under the credit
24 agreement based on the investment capacity, moving assets
25 into a non-loan party and unrestricted subsidiary, and

1 exchanging our debt into debt that would be against the
2 assets that we would move.

3 Q And what would the impact from your perspective of that
4 proposal have been on other creditors, other 1-L lenders,
5 had it been actually consummated?

6 A Sure. So there would be a few things. One was, of
7 course, the company would have increased liquidity, so it
8 would avoid the liquidity shortfall that we understood was
9 imminent.

10 It would also be a deleveraging transaction on a net
11 debt basis.

12 But then third was we would be moving our debt and
13 lending against the assets that we moved, and we would be
14 structurally senior to the other lenders.

15 Q Now, Mr. Hanigan, do you frequently participate in
16 restructuring transactions at Gamut?

17 A No.

18 Q Have you participated in any?

19 A Gamut has only been part of one restructuring, which
20 was a consensual out-of-court restructuring.

21 Q And when was Gamut founded, to your knowledge?

22 A 2015.

23 Q Fair to say you're not a frequent player in
24 restructuring -- the restructuring space.

25 A Gamut as a whole, correct.

1 Q Now, was your initial proposal accepted by the company?

2 A No.

3 Q And after did the company counter?

4 A Yes.

5 Q And was there an exchange of further term sheets?

6 A Yeah. There were many exchanges of term sheets. The
7 terms moved around quite a bit from term sheet to term
8 sheet.

9 Q And over time did -- how would you characterize the
10 nature of the terms in your Ad Hoc Group's term sheets,
11 vis-à-vis the company?

12 A I'm sorry, can you repeat?

13 Q Sure. Did the terms of your term sheet become more or
14 less company-favorable over time?

15 A More favorable to the company over time. The discount,
16 something in particular, is something that widened for the
17 company over time.

18 Q Now, did there come a time that negotiations between
19 your Ad Hoc Group and the company stopped?

20 A Yes.

21 Q And do you recall generally when that was?

22 A Early June.

23 Q And how did you learn that?

24 A The company stopped communicating with us, and then we
25 ultimately learned through informal channels that the

1 company was going to enter into a transaction with a
2 different group.

3 Q And at the time that you completed or when the
4 negotiations ceased, I should say, had you done legal due
5 diligence on the transaction?

6 A No. We went through our steps. You know, I think
7 where we started was a term sheet, we were very careful to
8 mark it with "Draft, this is for communication purposes
9 only, this is a nonbinding proposal."

10 We wanted to figure out terms that could work on a
11 principal basis. And that's typically how the process goes.

12 The next step would be have the lawyers actually figure
13 out the mechanics and go through the documentation to see if
14 it can work. You know, we obviously had no reason to think
15 our deal couldn't work or we wouldn't have been proposing
16 it. But we didn't get to the step where we even did the
17 work to ultimately decide one way or the other.

18 Q Were there important terms that in your view were still
19 left open?

20 A Almost every term continued to change as we traded term
21 sheets back and forth. I would say the collateral pool in
22 particular is something that there was still quite a bit of
23 diligence that would have been left to do to figure out what
24 was moving, what the assets were, if they could move, what
25 the value would be. So that was one of many things that

1 were moving around.

2 Q So far as you're aware, Mr. Hanigan, while your Ad Hoc
3 Group was negotiating with Serta, did Serta ever steer any
4 other lenders to you and suggest they join your group?

5 A No.

6 Q So far as you're aware, did Serta ever suggest to your
7 group that you propose a transaction structure other than an
8 IPCO structure?

9 A No.

10 Q So far as you're aware while you were negotiating with
11 Serta did the -- did any other lender approach your group
12 and ask to join?

13 A After we went under NDA with the company, no.

14 (Pause in the proceedings.)

15 Q Mr. Hanigan, if I could ask you to turn, please, to
16 Tab 3 in your binder.

17 MR. EHRLICH: And this is Debtor's 174, ECF 864-17
18 on the main Docket.

19 BY MR. EHRLICH:

20 Q Mr. Hanigan, this is an email from someone named Ryan
21 Brady to a number of people within Gamut; do you recognize
22 this?

23 A Yep.

24 Q And if you turn to the next page, you'll see it's a
25 presentation entitled "Serta Simmons Transaction Update May

1 2020."

2 Do you see that?

3 A Yes.

4 Q Were you a part of the preparation of this document?

5 A Yep.

6 MR. EHRLICH: Your Honor, I would move Defendant
7 -- excuse me, Debtor's 174 into evidence.

8 THE COURT: Any objection?

9 MR. SPEAKER: No.

10 THE COURT: It's admitted.

11 (Exhibit 174, ECF 864-17, received in evidence.)

12 BY MR. EHRLICH:

13 Q Now, Mr. Hanigan, could I ask you please to turn to
14 page 7 of the document? Then we go to the one, two, three,
15 four, fifth bullet, says, "While the asset's in structure."

16 It says, "While the asset is in structure of the
17 collateral package."

18 Does this reflect the current state of the negotiations
19 as of the date of this document in terms of what collateral
20 might be included in a transaction?

21 A Yeah. At the time, this would have been the thought of
22 what could be included.

23 Q And had there been evaluation done of these various
24 types of collateral at this point in time?

25 A Not to completion.

1 Q And would you have had to do that in order to negotiate
2 definitive documents?

3 A Yes.

4 Q Now turning to the bottom bullet, it says, "The terms
5 as described are based on the AHG's latest counterproposal
6 sent to the company on May 29th. While the data spread
7 between our counterproposal and the company's position has
8 narrowed, there may be further revisions to economics
9 presented as we further negotiate."

10 Do you see that?

11 A Yep.

12 Q And did you expect at this point in time to have
13 further negotiations with the company?

14 A Yeah. I mean, I think there's two parts of it. One is
15 there would be further negotiations and things could change
16 in the economic tier.

17 We also didn't comment at all here on the mechanics and
18 legally how it would get done because we hadn't really even
19 started there.

20 Q So sitting here today, do you know if you had been able
21 to reach a deal with the company what it would have looked
22 like?

23 A It's impossible to tell because of when conversations
24 ended.

25 Q Now going back to when you learned of the proposal the

1 company went with, what was your understanding of that
2 transaction?

3 A Sure. So we learned the details slowly. We didn't get
4 access to the amended credit agreement or the inter-creditor
5 credit agreement, or the new credit agreement until after
6 the deal had actually happened. But once we started
7 learning the general structure of the deal, you know, we
8 were surprised by what the deal construct was.

9 It ultimately involved a new money investment, but also
10 included a number of amendments throughout the document and
11 a new inter-creditor agreement which effectively allowed the
12 other group, which is now called the favored lender group,
13 to leapfrog everyone else.

14 And for our group, we went from first in line as first
15 lien credit holders to effectively last in line.

16 Q Now, just so it's clear, was Gamut ever invited to your
17 knowledge to participate in that transaction?

18 A No.

19 Q And when you went into buying Serta first lien loans,
20 Mr. Hanigan, in the -- starting in the fall of 2018 through
21 March of 2020, was it your expectation that the type of
22 transaction that was undertaken was possible?

23 A No.

24 Q Why not?

25 A Like I said, something fundamental to us was being

1 first in line, so getting paid off with all the other first
2 lien lenders. If we couldn't get paid back our principal,
3 we would own the business. I think to us, part of our
4 understanding comes from being a borrower.

5 So we never enter into a credit agreement with lenders
6 and then think, well, if things don't go well we can pay
7 off, you know, maybe half of the group before we pay off the
8 other half of the group because, you know, we do more
9 business with this half. It's just not something that has
10 ever been done before so we wouldn't have expected it,
11 something we never thought to do as a borrower or a lender.

12 You know, if we did think that that was a risk that we
13 wouldn't actually be a first lien lender, we probably never
14 would have bought into the credit here. But it's nothing
15 that we would have or could have expected.

16 MR. EHRLICH: Thank you, Mr. Hanigan. I have
17 nothing further. I'll pass the witness.

18 THE COURT: All right, thank you.

19 Anyone else that opposes confirmation have
20 questions?

21 (No audible response.)

22 THE COURT: All right. Thank you, gentlemen.

23 All right. Mr. Costa.

24 MR. COSTA: Thank you.

25 Good afternoon, Mr. Hanigan.

1 THE WITNESS: Good afternoon.

2 MR. COSTA: Good to see you again. We met in New
3 York last week, correct?

4 THE WITNESS: Yeah. Nice to see you.

5 MR. COSTA: All right. I think we're going to get
6 you a binder here.

7 MR. SPEAKER: May I approach the witness?

8 THE COURT: Of course, thank you.

9 CROSS-EXAMINATION

10 BY MR. COSTA:

11 Q You said a few times in your testimony that you thought
12 Gamut would be first in line under the credit agreement,
13 correct?

14 A Yeah.

15 Q Is it fair to say your main complaint is that after the
16 2020 transaction happened, Gamut's no longer first in line?

17 A That after the 2020 transaction that there's other
18 first lien lenders that get paid off before us, yes.

19 Q Right. Gamut bought all of its Serta debt on the
20 secondary market, correct?

21 A Correct.

22 Q Gamut was not a party to the original 2016 credit
23 agreement, right?

24 A We were not involved in the original negotiation. We
25 got assigned to it.

1 Q Right. But Gamut wasn't there at the negotiating table
2 in 2016, right?

3 A Correct.

4 Q And you don't have any personal knowledge about the
5 negotiations in 2016, right?

6 A No.

7 Q And would you also agree you have no personal knowledge
8 about the intent of the people who negotiated the agreement
9 in 2016?

10 A Not the specific people but the market more generally.

11 Q The market more generally -- okay. Well, in 2016 you
12 were an investment banking analysts one year out of the
13 University of Texas, correct?

14 A Yeah.

15 Q And I'll stipulate that's a great education, but would
16 you agree with me that you weren't following the credit
17 markets in 2016?

18 A I had an internship at Apollo, internship in investment
19 banking, worked at investment banking. And then after that
20 in private equity you don't just focus on the current
21 market. You also focus on past market environments to
22 understand what's possible.

23 MR. COSTA: Object as nonresponsive, Your Honor.

24 THE COURT: Sustained.

25 BY MR. COSTA:

1 Q In 2016 were you following the credit markets when you
2 were in that junior level investment banking analyst
3 position?

4 A I worked across M&A in restructuring. So I fully admit
5 I was fresh out of college, but I was following the credit
6 markets.

7 Q You'd never been involved in negotiating a credit
8 agreement in 2016, correct?

9 A In 2016, no.

10 Q Right. Now, at Gamut -- you moved to Gamut, and you
11 said in late 2018 Gamut first bought Serta debt, correct?

12 A Yep.

13 Q And you were part of the team at Gamut that monitored
14 that investment, right?

15 A Yep.

16 Q I think you said Mike Krieger, who is a partner, was
17 involved in that team, right?

18 A Yes.

19 Q And Jordan Zaken, who was a founding partner, was also
20 on that team, right?

21 A Yeah.

22 Q But Mr. Krieger's not testifying today, right?

23 A Correct.

24 Q Mr. Zaken's not testifying today, right?

25 A Correct.

1 Q Okay. You're the lucky one that was sent to testify in
2 court.

3 A Well, yeah, I mean, I think I went through my
4 responsibilities as a principal before, which is overseeing
5 all aspects of the investment. So that's really why I was
6 chosen to come here.

7 Q Let's talk generally about Gamut. You said there was a
8 normal, the usual diligence process Gamut conducted when
9 buying debt; do you recall that testimony?

10 A Yeah.

11 Q But the fact is Serta's the biggest debt holding
12 Gamut's ever had, correct?

13 A Correct.

14 Q And Gamut's only had one other major debt holding,
15 correct?

16 A Correct.

17 Q So would you agree Gamut's not a frequently player in
18 the syndicated debt market on the lender's side at least?

19 A On the lender's side we have not successfully purchased
20 a lot of debt. I would say for everything that we actually
21 do purchase there is tens of things that we attempt to
22 purchase and do our diligence on. And we also are a
23 frequent borrower.

24 Q You've never been involved in a liability management
25 transaction that was consummated, correct?

1 A We have not.

2 Q All right. And, in fact, before 2020 you didn't really
3 know anything about liability management transactions,
4 correct?

5 A I didn't know how they worked. But I also knew that
6 basket capacities are important to understand the
7 flexibility available to the borrower.

8 Q You hadn't ever examined a credit agreement prior to
9 buying Serta debt in which a liability management
10 transaction had occurred, correct?

11 A We never participated in any liability management --

12 Q Right.

13 A -- transaction so that's right.

14 Q Right. So you didn't look at credit agreements to see
15 what provisions had allowed liability management
16 transactions, right?

17 A We never looked at any credit agreements after a
18 liability management transaction was done. But we did
19 assess the basket capacities.

20 Q Let's talk about this credit agreement. One of the
21 terms that's been discussed quite a bit this week is the
22 indemnification provision. You don't even have an
23 understanding of what indemnification means, correct?

24 A I think I testified I work with counsel, and
25 indemnification is something that's more in their scope so

1 they would focus on. It's important to us. But I'm not a
2 lawyer so I don't have a deep knowledge of it.

3 Q Deep knowledge. But you don't really have even a
4 general understanding of indemnification, right?

5 A In the secondary credit markets I would have had
6 counsel look at it. And I don't have a -- even a basic
7 knowledge to really speak to it in this court.

8 Q Okay. So a long answer, but you agree it sounds like
9 that you don't have a basic understanding of how indemnity
10 works.

11 A In the secondary credit markets.

12 Q Right.

13 THE COURT: Do you have an understanding of it in
14 any other market?

15 THE WITNESS: I understand very broadly it's about
16 who is exposed to liability, and that's mostly it.

17 THE COURT: So your definition of an indemnity is
18 who's exposed to liability.

19 THE WITNESS: Who is going to bear a liability
20 that could present itself?

21 THE COURT: That's your definition of an
22 indemnity?

23 THE WITNESS: Yes.

24 THE COURT: Okay.

25 BY MR. COSTA:

1 Q All right. Let's talk about something else in this
2 credit agreement that's been a focus, Section 9.05(g) of the
3 credit agreement. Now, today are you familiar with that
4 provision?

5 A Yes.

6 Q And what does it do?

7 A It broadly outlines exceptions to a sacred right, one
8 of which is an open market purchase.

9 Q Right. And just to be -- the sacred right is the
10 sacred right to pro rata treatment, right?

11 A Yes.

12 Q And 9.05(g) is an exception to that sacred right,
13 correct?

14 A Yeah.

15 Q And pro rata treatment is really what you're saying you
16 were deprived of here, correct?

17 A Correct.

18 Q You thought you were going to be first in line. Now
19 you're not first in line, right?

20 A Yeah.

21 Q Okay. But back before you bought the Serta debt did
22 you ever review Section 9.05(g)?

23 A Our lawyers and -- reviewed the entire credit
24 agreement.

25 MR. COSTA: Object as nonresponsive.

1 THE COURT: Sustained.

2 BY MR. COSTA:

3 Q Did you, yourself, Mr. Hanigan, ever review 9.05(g)
4 before buying Serta debt in late 2019?

5 A I would have reviewed the entire credit agreement.
6 It's hard to recall five years ago. But I would have
7 reviewed the whole thing.

8 Q But you have no recollection of actually paying any
9 particular attention to 9.05(g), right?

10 A I can't remember one way or the other.

11 Q And did you have any general understanding of what an
12 open market purchase is back in 2019?

13 A Sure. The -- an undefined open market purchase, I
14 would have had my view of what that is.

15 Q But in credit agreements you had no experience with the
16 term "open market purchase," correct?

17 A Correct.

18 Q And you didn't know whether they were common or
19 uncommon in credit agreements, correct?

20 A Correct.

21 Q And during this diligence process that you said was so
22 thorough, you never focused on the open market purchase
23 provision, correct?

24 A I don't recall. It's something counsel would have
25 looked at. But I don't recall if we focused on it or not.

1 Q So sitting here today you can't remember ever focusing
2 on 9.05(g) before buying the debt.

3 A Correct. I don't remember one way or the other.

4 Q So you said that your beef is not being first in line
5 anymore, correct?

6 A Yeah.

7 Q But you understand the deal you were proposing was
8 going to give you structural priority over the other first
9 lien lenders who didn't participate, right?

10 A Uh-huh.

11 Q So effectively they would have had the same -- they
12 would have been in the same situation, correct?

13 A No. We would have only been first in line against the
14 assets that we would have moved. And we would have moved
15 those assets based on the basket capacities outlined in the
16 credit agreement, which is something that we and I think
17 most people in the credit markets expect is, you know,
18 something that's available to the company.

19 Q Well you said people expect that that could happen on
20 the credit market, right; is that your testimony?

21 A Yes.

22 Q And I think you believe your proposal was made in good
23 faith, right?

24 A Yeah.

25 Q And that's because, one, you think it was allowed under

1 the credit agreement, right?

2 A Yeah.

3 Q And, two, because you thought people would have
4 expected a transaction like that, right?

5 A Yeah.

6 Q Okay. And what transaction was precedent for the type
7 of transaction you were proposing?

8 A I mean, there were precedent transactions, a number of
9 them. I wouldn't be able to name all of them or even know
10 the details of them. I think we spoke about in my
11 deposition J. Crew is one that was newsworthy about moving
12 IP and lending against it.

13 Q Right. In fact, I think your testimony was J. Crew was
14 the only dropdown transaction that you could cite as a
15 precedent for your proposal, correct?

16 A Correct. I couldn't cite a bunch of precedent cases.
17 I just knew conceptually what happened and how it could
18 happen.

19 MR. COSTA: Object to the rest of his answer after
20 "yes" as nonresponsive.

21 THE COURT: Sustained.

22 BY MR. COSTA:

23 Q When did J. Crew occur? When did that transaction take
24 place?

25 A I don't recall.

1 Q You're not aware it took place in 2017.

2 A I didn't know the year, no.

3 Q But would you agree with me that under your view of the
4 world where people have to have seen a prior transaction,
5 what would matter is whether a transaction had happened
6 before this agreement was signed in 2016, right?

7 A From my view of the world I think that expectations
8 certainly are enhanced when something has happened. I think
9 there is also an expectation that there's fundamental things
10 you're buying into. So, you know, I won't go into what our
11 fundamental view was, but obviously being first in line was
12 important.

13 MR. COSTA: Strike as nonresponsive, Your Honor.

14 THE COURT: Sustained.

15 BY MR. COSTA:

16 Q I guess my question's a pretty basic one. If J. Crew
17 happened in 2017, it's obvious that couldn't have been on
18 the minds of people who negotiated this credit agreement in
19 2016, right?

20 A Sure.

21 Q Okay. And speaking about priority, part of your
22 proposal was a \$200 million new cash loan, correct?

23 A Yeah.

24 Q And that would have had priority, correct?

25 A Yeah.

1 Q So the first lien lenders under the original credit
2 agreement would no longer be first in line because that 200
3 million would come first, right?

4 A By using the indemnities baskets allowed.

5 Q Oh, you say -- you're saying, but the answer is yes,
6 they wouldn't have been first in line anymore, correct?

7 A Correct. There are certain baskets that allow for new
8 money to come in and be senior to the first lien.

9 Q Right. And that's because the credit agreement
10 provides for that, right?

11 A And companies often times tap the credit markets and do
12 exercises similar to that, yes.

13 Q Okay. So there was no absolute right to be first in
14 line, you'll agree with that.

15 A There is exceptions to the absolute right.

16 Q Right. You were just really complaining about the
17 mechanics of how you came to be -- lose your priority
18 status, correct?

19 A And where I ultimately ended up where other first lien
20 lenders now get paid first and my recovery is basically
21 zero.

22 Q Right. But someone else could have done a drop --
23 Apollo and Angelo Gordon could have done a dropdown
24 transaction without you, right?

25 A Yeah.

1 Q And then you would have been facing the -- those
2 similar consequences, correct?

3 A I would say it's a totally different deal but --

4 Q As to the IP collateral, you wouldn't have been first
5 in line, correct?

6 A Yes.

7 Q All right. You weren't happy you said when the -- when
8 Serta accepted our client's proposal, correct?

9 A Correct.

10 Q But it wasn't clear then if it was going to be a good
11 or bad thing for you, right?

12 A It was pretty clear that we went from being a first
13 lien lender to being behind a billion dollars of debt so --

14 Q Right.

15 A -- it was not good.

16 Q And that matters if the company can't pay, correct?

17 A Correct.

18 Q But it also meant you weren't going to have to give a
19 discount on your -- the debt you held, correct?

20 A Correct.

21 Q So if the company flourished, you would have been
22 better off not doing the deal, correct?

23 A I think there's another scenario where the company
24 didn't do the deal and then was restructured. So that's
25 something we would have also been comfortable with. So

1 there's multiple outcomes.

2 Q But my question is, if the company was on -- stayed on
3 firm financial footing, was paying back its interest, you
4 would have been better off not selling your debt at a
5 discount, correct?

6 A Correct.

7 Q Okay. And, in fact, for a while Serta debt was trading
8 well above where you had bought it at, but after the 2020
9 transaction?

10 A Not immediately. It ultimately ended up trading up.

11 Q Right. So let's look at Debtor's Demonstrative No. 1,
12 which has already been admitted. And your cost basis at
13 Gamut was in the 50s, right?

14 A Yeah.

15 Q And if we look starting around March, 2021, it's in the
16 high fifties. And then for basically over a year it's
17 trading above your cost basis, correct?

18 A Yeah.

19 Q In fact, in May, June it's almost trading at 80,
20 correct?

21 A Yeah.

22 Q So you could have made quick math about 30 percent; is
23 that right? Just ballpark, if you were able to see it in
24 the high 70s.

25 A If we could have sold into any liquid market.

1 Q Right. But you didn't even think about selling it in
2 2021 when it was selling at almost 80 cents on the dollar,
3 correct?

4 A The down markets are a liquid. So for us, with a
5 position of size, we wouldn't have been able to sell out of
6 it anyway. So we didn't even try.

7 Q Okay. So you finally got to the answer at the end.
8 You didn't even think try, though.

9 A Correct.

10 Q Even though you have a fiduciary duty to your investors
11 to make them money and protect against loss, correct?

12 A Correct, because we physically wouldn't be able to see
13 160 million dollars of debt into a liquid market.

14 Q But you said you didn't even look into it, into selling
15 some of it, right?

16 A But we also understand the volume that --

17 Q Did you or did you not look into selling any of it?

18 A We did not try to sell any of it.

19 Q Even though you acknowledge you have a fiduciary duty
20 to your investors to make them money and prevent loss.

21 A Correct.

22 Q Now, in 2021, when the prices were trading close to 80,
23 you were subject to a cooperation agreement with Angelo
24 Gordon and with Apollo concerning the Serta debt, correct?

25 A Correct.

1 MR. COSTA: All right. If we can -- it was
2 already admitted. It was admitted with the last witness,
3 Debtor's 266. And turn to page 28. If we can blow up that
4 page?

5 BY MR. COSTA:

6 Q Under that cooperation agreement there were limits on
7 your attempts to sell any Serta debt, correct?

8 A Yes.

9 Q Okay. If you actually look at the third bullet under
10 the first bullet. "During the cooperation period, each
11 holder agrees it will not support, pursue, or enter into any
12 agreement with respect to any exchange offer, tender offer,
13 sale purchase, or repurchase of 1-L or 2-L debt."

14 So this cooperation agreement didn't allow you to sell
15 the debt in 2021 when it was trading at almost 80 cents on
16 the dollar, correct?

17 A Correct. We are comfortable with it because we
18 wouldn't have been able to sell anyways was our view.

19 Q But that was -- the agreement prevented you from doing
20 so, correct?

21 A Correct.

22 Q You also testified that did you say you weren't sure
23 your proposal was lawful?

24 A No. I believe I went through the steps where I said we
25 didn't get to the point to determine one way or the other.

1 But we certainly didn't think that it was unlawful or we
2 wouldn't have proposed it was what I testified.

3 Q Well you were exchanging all these terms with the
4 company, correct?

5 A Yeah.

6 Q You had Paul Weiss as legal counsel, right?

7 A Yeah.

8 Q One of the best restructuring practices in the country,
9 correct?

10 A Yeah.

11 Q You're paying them a lot of money, right?

12 A Yeah.

13 Q And you -- today, you're not sure if the proposal you
14 made was lawful.

15 A Well we never got into the mechanics of actual
16 definitive documentation to determine one way or the other.
17 We were an interim step, which I think is why the term sheet
18 says this is for discussion purposes, this isn't a legally
19 binding document, because we never got there. We were in a
20 middle stage.

21 Q So it's a long way of saying, no, you weren't sure it
22 was legal.

23 A We had no reason to think it was illegal. But we
24 didn't make a final determination.

25 Q And your suggestion is that maybe, you know, your

1 proposal wouldn't have been accepted or wouldn't have been
2 the actual deal that Serta entered into; is that right?

3 A Yeah.

4 Q But you made a term sheet offer, correct?

5 A Correct.

6 Q And Serta could have accepted, correct?

7 A No. It actually says you can't accept anything on
8 here. It's nonbinding, so there's nothing they could have
9 accepted. We could have continued the negotiation.

10 Q So you didn't even have a proposal for Serta that they
11 could have accepted and an alternative to the one they did
12 accept.

13 A If they continued to advance the negotiations we would
14 have ultimately gotten to something. But there were a lot
15 of steps that were left to do, and we didn't get the full
16 engagement to get there.

17 MR. COSTA: All right. Nothing further, Your
18 Honor.

19 THE COURT: All right, thank you.

20 Anyone else that supports confirmation have
21 questions?

22 (No audible response.)

23 THE COURT: All right. Any Redirect, Mr. Ehrlich?

24 MR. EHRLICH: No, Your Honor.

25 THE COURT: All right. Mr. Hanigan, thank you for

1 your testimony this afternoon. You are free to go.

2 THE WITNESS: Thank you.

3 (Witness excused.)

4 THE COURT: Thank you.

5 All right. Mr. Ehrlich.

6 MR. EHRLICH: So, Your Honor, at this point we do
7 not have any further witness testimony.

8 THE COURT: All right.

9 MR. EHRLICH: We do -- we are working I think
10 cooperatively with the Debtors and the PTL lenders on
11 stipulated exhibits.

12 THE COURT: Okay.

13 MR. EHRLICH: What we would ask is that we be
14 permitted to rest, and I guess this goes for our
15 counterparties as well, with the exception of being able to
16 submit proposed stipulated exhibits to you. And I think we
17 should be able to do that very likely if not later today,
18 tomorrow.

19 THE COURT: Got it. Let me do this first. I
20 assume there's no rebuttal?

21 (No audible response.)

22 THE COURT: All right, so no rebuttal. So subject
23 to the submission of stipulated exhibits, as well as these
24 three transcripts, or have they already been provided? You
25 have them in that book.

1 MS. BARRINGTON: Yes. I mean, we have filed them.

2 THE COURT: I was really hoping it'd be a smaller
3 notebook.

4 MS. BARRINGTON: Unfortunately not, Your Honor.

5 THE COURT: Just tell me the type is big. I mean,
6 give me something.

7 MS. BARRINGTON: That's why it's so large, the
8 type is big, Your Honor.

9 THE COURT: Fair enough.

10 MS. BARRINGTON: Your Honor, we did file these and
11 mark them as exhibits.

12 THE COURT: Terrific. So they're already on the
13 Docket.

14 MS. BARRINGTON: That's correct. And I can
15 provide those ECF numbers and the exhibit numbers on the
16 Record if you'd like.

17 THE COURT: That's -- no. If they're on the
18 Docket, that's terrific. So I've got three transcripts.
19 You're going to give me a list of stipulated exhibits. And
20 with that, that will close the evidence?

21 MS. BARRINGTON: That's right, Your Honor.

22 THE COURT: All right.

23 MR. EHRLICH: I think we agree.

24 THE COURT: All right, thank you.

25 What else do we need to talk about today,

1 Mr. Schrock? Thank you.

2 MR. SCHROCK: Good afternoon, Your Honor, Ray
3 Schrock of Weil, Gotshal, and Manges, counsel for the
4 Debtors. There's -- I think we're all done for today, --

5 THE COURT: Okay.

6 MR. SCHROCK: -- subject to anything the Court
7 would like to cover.

8 THE COURT: So let me -- in terms of thinking
9 through -- and, first of all, with respect to closing and
10 your briefing, I want you to do whatever it is you think is
11 in the best interest of your client.

12 MR. SCHROCK: Sure.

13 THE COURT: To the extent that you're open to
14 making sure that you include certain things, --

15 MR. SCHROCK: Yes.

16 THE COURT: -- so let me for just a second.
17 Sorry. One day I'll get rid of this.

18 There's been an awful lot of testimony with
19 certain assumptions about, you know, about dropdowns,
20 uptiers. I mean, we all -- they're just words, right? And
21 we all like to use them because they make us seem really
22 smart, and the general public says, you know, they must be
23 smarter than us. But they're just words.

24 And so I'm going to give you a different word,
25 because I like acronyms. I've looked at all of this as a

1 position enhancing transaction. So my acronym is a PET.
2 And it doesn't really matter whether you have a cat or a
3 dog, the result's the same. That's how I'm looking at this.

4 And so to the extent that you want to argue in one
5 direction or another or that I'm looking at this wrong, I
6 certainly want to hear that if there's some authority out
7 there that says, no, there's a fundamental difference. But
8 I just don't -- I don't see it, as I look at this.

9 I'm not saying that anything is right or I'm not
10 saying anything is wrong. I'm just telling you how I'm
11 looking at it. I mean, the fact that people want to ascribe
12 titles to a particular transaction, I mean, you can go so
13 far down in the weeds, you can make everything different.
14 And I look at it sort of just cause and effect because
15 that's just -- that's how my brain works.

16 And but looking at it again as a pet, you know, if
17 you and I are lenders and my position is improved as to you,
18 by definition that means your position as to me is --

19 MR. SCHROCK: Diminished.

20 THE COURT: -- diminished. I mean, that's exactly
21 right.

22 And so that's -- as you work through your closing,
23 as you work through your briefing, you know, might be
24 helpful to sort of tell me where I'm wrong in approaching it
25 like that because I've just never bought off on the fact

1 that, you know, 20-year-olds can get in a room late at night
2 and say, we're going to call it this, and now all of a
3 sudden that means something out in the market. I just
4 fundamentally don't believe that.

5 And that's not a criticism of 20-year-olds. They
6 are -- it is those young brains that make things work. I'm
7 not being critical. It's just I don't think they determine
8 what cause and effect is.

9 I do have a suggestion for the Debtors, as well as
10 the -- those folks who support the plan. This is
11 complicated. And I would ask that you consider getting rid
12 of the death trap --

13 MR. SCHROCK: Okay.

14 THE COURT: -- because I don't know that you want
15 that to be a distraction. But, again, that's not a
16 requirement. It doesn't mean that I'm going to do any
17 particular thing whether you do or not do it. I'm just
18 saying, you know, just think through it. And you know how
19 the Eighth Circuit has always talked about asking for too
20 much.

21 MR. SCHROCK: Yeah. We will, Your Honor. We'll
22 talk it over.

23 THE COURT: Got it. I -- and I now understand --
24 I didn't understand why LCM was taking the position that it
25 was taking, but I now understand perfectly why they are

1 where they are.

2 I do -- I would like you, everybody, to focus on
3 this reasonable or the expectation of a reasonable person or
4 the reasonable expectations, however you want to phrase
5 that.

6 And I have been doing my own research. But to the
7 extent that you have additional research that talks about,
8 you know, as I look at this, do I get to -- you know, do I
9 get to consider the actions of the parties involved, is that
10 definition -- or is that instructive as to what the actual
11 expectations of the parties were?

12 And, I mean, you've heard today you have really
13 different levels of experience. I mean, it sounds great
14 until you start putting them next to one another and then --

15 MR. SCHROCK: Right.

16 THE COURT: -- you see there's a huge issue out
17 there.

18 But to the extent that, you know, as we look at
19 this, to continue my animal analogy, is that am I picking as
20 I -- am I picking sort of this, yeah, this dog out there
21 that has no experience in anything or am I looking at, you
22 know, the vultures that are sitting over the dying carcass
23 and, based upon their past experience and what they're after
24 and what they're trying to do, is that the world in which I
25 live?

1 And so to the extent that there can be additional
2 argument, briefing with respect to that issue, that would be
3 really helpful. I have --

4 MR. SCHROCK: Understood.

5 THE COURT: I have some views about that.

6 With respect to the indemnity, I've heard a lot
7 and I've heard about how it's carried forward. And I
8 understand the amendments that got made. And I understand
9 why you made the amendments. It was to address some of
10 those arguments.

11 You know, I started my whole analysis with looking
12 at it in the context of 1123(b)(2) and what you're entitled
13 to include under a plan and what you're not.

14 I understand -- you know, I understand that
15 sometimes you make the best business decision you can based
16 upon the circumstances that you face. I mean, I think
17 that's exactly what the circuit talks about in some of those
18 decisions, such as *Jackson Brewing*, *Foster Mortgage*, and so
19 on. I mean, you -- it's the process you go through and the
20 decisions that you make.

21 And so, you know, to the extent that you want to
22 focus the argument, the briefing on, you know, on that issue
23 and whether or not -- I mean, I've never heard this before,
24 but I'm not suggesting that there's not an economic coercion
25 issue out there. I just don't know. Never looked at it

1 from that perspective. But I'm just trying to give
2 everybody insight as to how I look at this.

3 The arguments that got made about, well, if you
4 could just do the plan without this one feature, I mean,
5 while it was incredibly entertaining, it was also -- I mean,
6 it was just fanciful. The plan that got proposed couldn't
7 have been proposed without consent. And if you didn't have
8 that, you didn't have consent. I got that; don't need to
9 address that.

10 But I didn't want anyone to think just because I
11 had fun poking at it that that was something that I was
12 really focused on. It's not. I fully understand that
13 issue.

14 With respect to the claim on the breach of the
15 implied duty of good faith and fair dealing, nobody's really
16 made the argument. I don't even know if it's applicable.
17 But I'm curious, you know, it's -- that in large part is an
18 equitable remedy.

19 And I am very curious if there is any New York law
20 out there about, you know, the old concept about in order to
21 get equity, one must do equity. And I would be very curious
22 to see what the state of the world is about that.

23 I didn't hear a lot of evidence, I can't think of
24 any, I mean, maybe there was some and I just missed it. But
25 to the extent that the issue about the violation of the

1 absolute priority rule is still out there, I would like to
2 have a better understanding of what evidence supports that
3 and what arguments -- you know, maybe it'd just be, well,
4 all you have to do is look at these two provisions of the
5 plan, let me make the argument, cite the Fifth Circuit case,
6 and that's my argument. I got all of that. I just didn't
7 hear anything.

8 And obviously, you know, absolute priority rule
9 can only be bought -- can only be brought by certain
10 creditors. You can't be at the top of the stack and say,
11 well, that violates the absolute priority rule.

12 So I'd be curious to hear arguments about whether
13 or not that is still an argument that I need to address.

14 I have signed the order with respect to the North
15 Star issue. I don't think it's been docketed yet, but I did
16 sign it this morning.

17 MR. SCHROCK: Thank you, Your Honor.

18 THE COURT: Of course.

19 With that, I don't think -- I have all sorts of
20 questions, but I'm going to wait and see what people do with
21 closing argument as well as the briefing.

22 You know, please come prepared to engage because,
23 again, I mean, I -- this is important. There are a lot of
24 people that are watching it. It's, you know, I -- not in --
25 you know, not in the least the employees who want to make

1 sure that they're going to have a paycheck tomorrow.

2 And so I -- you know, I'm going to come prepared
3 to test what I believe. I'm going to come prepared to test
4 what everybody believes in hopes that at the end of the day
5 I get it right. And if I don't, someone will tell me.

6 What else do we need to talk about? We've got a
7 date for closing. Any other issues that we need to talk
8 about?

9 MR. SCHROCK: Nothing from the Debtor's
10 perspective.

11 THE COURT: All right. Mr. Hermann or -- I know
12 you were listening or you were getting in -- you were
13 getting comments.

14 MR. HERMANN: Thank you, Your Honor.

15 For the Record, Brian Hermann from Paul Weiss on
16 behalf of the non-favored lenders.

17 I would only make a practical observation, --

18 THE COURT: Sure.

19 MR. HERMANN: -- which is in my experience, when
20 there's a big gap between the closing of a trial and the
21 closing argument, people should use that time to maybe talk.
22 My friend Mr. Schrock over here and I will have no problem
23 doing that if there's something to talk about.

24 But I do think -- and I reflected on Mr. Millar's
25 comment yesterday about mediation and your response, which

1 I've heard many times that you're not going to order people
2 to mediate if there's -- if they're not willing. And I
3 generally agree with that.

4 Here, I think the limitation on peoples' ability
5 to talk is really interfering with what I think, you know,
6 could possibly be a fruitful discussion or, you know, at
7 least a discussion. And so I would --

8 THE COURT: Is that because of contractual issues?

9 MR. HERMANN: Yes.

10 THE COURT: So I've been thinking about that. And
11 when I was walking my dog this morning as I was thinking
12 about all of you, which is something I've got to get past.

13 (Laughter)

14 THE COURT: I have -- I toyed with the idea of --
15 and I don't want to cause heartburn for anybody. But what I
16 toyed with was a vehicle by which I could say, you know, to
17 the extent, you know, I am ordering everybody to discuss
18 alternatives.

19 What I didn't want to do was to cause somebody an
20 immense amount of heartburn. But I am perfectly happy to
21 enter that order. And, again, once my view of that, so the
22 world hears it, if I enter that order, you are cloaked in my
23 immunity and have no liability under any contractual
24 arrangement that might exist.

25 This is about the Debtor. And if there are

1 agreements out there that cause this Debtor harm because
2 people have said, don't talk -- because I knew LCM is in
3 that position. And, again, because I never understood what
4 they were doing when I made the comments that I made on day
5 one. I now understand perfectly where they are. Maybe I
6 should have brought this up earlier because they've really
7 hurt themselves by just given where they are.

8 I am happy to enter that order if, you know, if
9 people think that would be helpful because I would think
10 with the skill and the talent that's in this room, and
11 understanding what I think you all are trying to do, and
12 that is to take something that someone worked really hard to
13 put together, i.e., the company in the first place, and
14 given its position in the market and the market that it
15 serves, that we would all find a way to, you know, perhaps
16 to, you know, give a little to try and make sure that this
17 doesn't die, you know, while waiting on a circuit decision
18 or a Supreme Court decision and that sort of thing.

19 And I'm not -- that's not a bad -- that's not a
20 comment on the court system. It's just a comment that
21 sometimes you can die waiting to get the answer.

22 And I encourage that to happen. But I -- if one
23 person stands up and says, no, that really causes me
24 heartburn, you know, then I won't do it. But thank you for
25 reminding me about that. I'm happy to hear comments about

1 that.

2 MR. SPEAKER: I can --

3 MR. HERMANN: I will give you the podium in a
4 second.

5 My response to that is we would welcome that
6 because I can't promise that ultimately we'll show up next
7 week and say that peace has broken out. But we will
8 certainly try.

9 THE COURT: Sure.

10 MR. HERMANN: And right now I think we're impeded
11 from even trying.

12 THE COURT: Then I -- you know, fair enough. I am
13 perfectly happy -- Mr. --

14 MR. SCHROCK: I have something to --

15 THE COURT: -- Schrock, sure, please.

16 MR. SCHROCK: Your Honor, I mean, as the -- as a
17 lawyer representing the one party that's fiduciary for all
18 stakeholders here, we -- you know, listen. We do have
19 restructuring support agreements with people. We have taken
20 votes. We have a plan that's up for confirmation.

21 And with all due respect to my good friend
22 Mr. Hermann and Mr. Millar, they have one goal, which is to
23 blow up our plan, okay. And I understand that there may be
24 attendant good reasons for what they good faith believe that
25 should happen.

1 But what I don't want to have happen is people get
2 ordered to a mediation because they have their own motives
3 for trying to make money and, you know, our plan gets put in
4 jeopardy.

5 If they have something to say, we will talk to
6 them. We've said, listen, we are here, we will talk to
7 them. We don't need a mediator at this moment --

8 THE COURT: So, one, I was --

9 MR. SCHROCK: -- to do that.

10 THE COURT: -- never going to mediate. The order
11 was going -- the order, if I enter it -- and I said if one
12 person said no, I wasn't going to do it -- that order would
13 just say the parties are free to discuss plan alternatives
14 without liability, period. That's all I was going to say.

15 If that is not -- again, not trying to create a
16 problem --

17 MR. SCHROCK: Yeah, I know, I just --

18 THE COURT: -- for everyone --

19 MR. SCHROCK: -- am thinking through, you know,
20 the implications --

21 THE COURT: No, the fact that you're --

22 MR. SCHROCK: -- for that for --

23 THE COURT: -- worried about it says I shouldn't.
24 I came --

25 MR. SCHROCK: Right.

1 THE COURT: I was worried about it as well. And I
2 came to --

3 MR. SCHROCK: Yeah.

4 THE COURT: -- the conclusion that I -- you know,
5 it would be an unusual order.

6 MR. SCHROCK: I know. I mean, I'll be honest with
7 Your Honor, I -- of course I defer to the Court on many
8 things. This is one that I would say I don't love it --

9 THE COURT: Sure.

10 MR. SCHROCK: -- just because we're --

11 THE COURT: Then I won't do it.

12 MR. SCHROCK: -- in the middle of a confirmation
13 trial, and if there's something that's going to happen with
14 regard to this company, we want it to go through us. We
15 really do. And I don't want people going around us trying
16 to bring together some kind of --

17 THE COURT: So --

18 MR. SCHROCK: -- coalition of the willing to
19 change votes.

20 THE COURT: -- let me ask this.

21 MR. SCHROCK: And that's what'll happen.

22 THE COURT: So fair enough. Let me ask you this.
23 What if I order you and Mr. Hermann to have a settlement
24 conference?

25 MR. SCHROCK: That's fine.

1 THE COURT: Mr. Hermann, I know that doesn't get
2 you a hundred percent of where you are, but it does give you
3 some protection to at least have conversations.

4 MR. HERMANN: Yeah. I would say a couple of
5 things. One is we're not here to blow up the Debtor's plan.
6 We actually want the company to reorganize. We think there
7 is a better way to do this.

8 And we actually don't think an overhang of
9 litigation, whether it's here or the Fifth Circuit, back to
10 here or back to New York, wherever it is, is in the best
11 interest of the company.

12 I think I take Mr. Schrock's point. We're not
13 looking to go around the Debtor. If the Debtor wants to be
14 part of every conversation, I have no problem with that.

15 MR. SCHROCK: That's code, Brian.

16 MR. HERMANN: No, it's not.

17 MR. SCHROCK: With all due respect.

18 MR. HERMANN: No, it's not.

19 MR. SCHROCK: Yes, I've been doing --

20 MR. HERMANN: And --

21 MR. SCHROCK: -- this a long time.

22 THE COURT: In all fairness, I would have taken it
23 that way, as code.

24 MR. HERMANN: Oh, no, it's definitely --

25 MR. SCHROCK: I want you to be on the phone while

1 I talk to your creditors.

2 MR. HERMANN: No, no, no, no. I -- we have no
3 issue with the Debtor being involved in everything. We're
4 not looking to go around the Debtor.

5 But I do think it's important to include
6 principals from Mr. Greenberg's group, not just the Eaton
7 Vances and Siestas (phonetic) of the world, but other people
8 in the group who frankly may have a different view about
9 some of the issues that are here; because I think frankly
10 without people in his group, my good friend over here is
11 going to be limited in what he can do.

12 THE COURT: Mr. Greenberg.

13 MR. GREENBERG: Afternoon, Your Honor. Scott
14 Greenberg, Gibson Dunn & Crutcher for the Record.

15 And I was -- I know Mr. Hermann well and respect
16 him quite a bit. But I was a little bit confused by the
17 commentary about people not being able to talk because that
18 sounds more like a co-op, which doesn't exist.

19 We do have an RSA, as Mr. Schrock said.

20 THE COURT: Right.

21 MR. GREENBERG: And we stand before you after a
22 week of evidence as we push towards confirmation. I would
23 say as we always do in all of these deals, we're always
24 happy -- and I think in the first instance through the
25 advisors -- to hear from Mr. Hermann and his clients on that

1 side of the table if there's some kind of settlement
2 proposal that obviates the need for next week.

3 But I do think in the first instance there is an
4 RSA, votes are in. There's overwhelming support for the
5 plan.

6 I share many of Mr. Schrock's concerns just in
7 practice --

8 THE COURT: Right.

9 MR. GREENBERG: -- about how these things happen
10 behind the scenes. So I think the three of us candidly as
11 professionals that work together all the time, and others
12 that want to join us, not a formal mediation, should sit
13 down and use the week to progress conversations.

14 But I -- if what we're asking is to effectively
15 terminate an RSA as we're -- that does not work for us.

16 THE COURT: No, I totally got that. So let me
17 just -- let me poke at this a little bit --

18 MR. GREENBERG: Sure.

19 THE COURT: -- more because I'm trying to find out
20 where your line is. If I ordered counsel and a client rep,
21 a non-lawyer, to meet, is that something that you think is
22 within your safe zone?

23 MR. GREENBERG: Sure, I have no issue with that,
24 Your Honor.

25 MR. SCHROCK: I think that's a good idea.

1 THE COURT: Mr. Hermann.

2 MR. HERMANN: I have no issue with that. But I do
3 think that there are people within the Gibson Dunn Group
4 that we would like to talk to in the Debtor's presence, no
5 problem, that I don't think that is a monolithic group, and
6 I don't want to just talk to one person in that group who
7 may think one way, which is the way we've heard, because I
8 don't think that's going to be particularly productive.

9 THE COURT: So who is that you're focused on?
10 It's a public forum.

11 MR. HERMANN: I'm focused on Faralon, Sedus
12 (phonetic), and Baupost (phonetic).

13 THE COURT: All right. And are those -- have
14 those -- I mean, those folks have counsel, do they have --

15 MR. GREENBERG: Scott Greenberg again for the
16 Record, Your Honor.

17 They are part of the group so we are their
18 counsel. They're represented within our group.

19 THE COURT: So would you have an objection to the
20 extent they want to come --

21 MR. GREENBERG: I'm happy to have a conversation
22 with them and --

23 THE COURT: Okay.

24 MR. GREENBERG: -- get their feedback and see how
25 they want to proceed. I assume we're talking about people

1 that were involved in the original transaction versus not
2 involved in it. So I understand where Mr. Hermann's going
3 with the selection. So that's a conversation I need to have
4 with my clients.

5 MR. SCHROCK: And I would just ask, Your Honor,
6 whatever we do, of course, I don't think there's any
7 objection to this, I'll call it 408 plus. You know,
8 whatever we talk about in that context in the settlement
9 discussions, you know, doesn't -- you know, is not
10 admissible and/or is not otherwise --

11 THE COURT: I won't ever --

12 MR. SCHROCK: -- public.

13 THE COURT: I won't ever hear it.

14 MR. SCHROCK: Okay.

15 THE COURT: I mean, under any circumstances,
16 except in a murder trial. And I don't have that authority
17 so it won't be me.

18 (Laughter)

19 MR. SCHROCK: Fair enough, Your Honor, thank you.

20 THE COURT: All right. Mr. Millar.

21 MR. MILLAR: I feel sort of left out here. I
22 guess I was -- Your Honor, I would say my client wants to be
23 part of that discussion, and I think you know why. And that
24 is because we have money to put to work in this company. We
25 want to see a solution. We think we can solve peoples'

1 problems.

2 THE COURT: Right.

3 MR. MILLAR: And --

4 THE COURT: So let me give you a reaction --

5 MR. MILLAR: Yeah.

6 THE COURT: -- before you go any further. I
7 listened to you when you first step up. You made certain
8 representations to me regarding what your client was really
9 trying to do. And then I saw the proposal.

10 I've been around a long time. And your statements
11 to me -- and I'm just giving you my perception. I'm not
12 angry about it. I'm just not going to do anything. I'm
13 just giving you my perceptions.

14 Your statements to me and the proposal I saw were
15 not consistent. And so my view of it is, you know, if you
16 can -- as I told you before, if you can independently go get
17 a friend, you go do whatever it is that you believe keeps
18 you within the rules, the Code, the law, all fine. But I'm
19 not helping you, not given the way you stepped up and said,
20 here's what we're trying to do, and then I saw the proposal.

21 You know, you -- and, again, I'm not being
22 critical. You tried to play a game with me. And
23 unfortunately for you I've been around this a long time and
24 I've played about every game there is to play. So I'm not
25 helping you.

1 MR. MILLAR: Well, let me just say I apologize if --

2 THE COURT: You don't --

3 MR. MILLAR: -- I didn't --

4 THE COURT: No, no, no, you don't need to
5 apologize. I'm just giving you an honest reaction.

6 MR. MILLAR: I truly thought I was making the
7 right representation --

8 THE COURT: I don't --

9 MR. MILLAR: -- in the term sheet.

10 THE COURT: It doesn't in any way affect your
11 integrity, your capability. I think you're a great lawyer,
12 I genuinely do. It's just, you know, your client stuck you
13 in a bad position. And, again, I'm not trying to help you.

14 MR. MILLAR: Okay. Thank you, Your Honor.

15 THE COURT: Yes, sir.

16 Mr. Lieberman.

17 MR. LIEBERMAN: Yes, Your Honor. We feel a little
18 bit left out.

19 THE COURT: You spent the entire trial trying to
20 be left out.

21 (Laughter)

22 MR. LIEBERMAN: Awesome, true. I appreciate your
23 comment and take it that you now understand the position --

24 THE COURT: I do.

25 MR. LIEBERMAN: -- we're in.

1 THE COURT: I do.

2 MR. LIEBERMAN: I think going forward, to the
3 extent that, you know, we should be talking to people, and
4 that's some of what you're talking about, --

5 THE COURT: Do --

6 MR. LIEBERMAN: -- we'd like to be included in --

7 THE COURT: Do you have to talk to them through
8 Mr. Hermann?

9 MR. LIEBERMAN: No. We're not -- we don't have --
10 we tried to establish there's a -- you know, we have similar
11 positions, we're in the same class of creditor, but we're --

12 THE COURT: So let me tell you this. And, again,
13 I want to be helpful, but I'm not going to be meddlesome, if
14 that -- if -- hopefully you understand the distinction.

15 I am perfectly happy -- under the cloak of the
16 authority that I have and the protections that I have, I am
17 perfectly happy to order a settlement conference and say the
18 following people shall attend, you know, Weil with a client
19 rep, and Mr. Greenberg with representatives of "A," "B," and
20 "C," and Mr. Hermann with representatives of "A," "B," and
21 "C." And if it needs to be Mr. Hermann and Mr. Lieberman, I
22 am perfectly happy to do that.

23 But it's going to be very, very specific. There
24 are going to be no add-ons. And there's not going to be,
25 well, we can agree that this person can come. That order is

1 going to be strictly construed.

2 But, again, if people think it will help --
3 because at the end of the day, I don't want anyone to ever
4 forget. I got it that there's litigation out there. But I
5 care about the Debtors that I have in front of me. I care
6 about their business. I care about their employees. I care
7 about the space they occupy in commercial America. That's
8 what I care about. If I can help bridge the two, I'm more
9 than happy to do it.

10 But I want a very specific order that says -- you
11 know, what I'd like it to say, we're going to meet in
12 New York at the offices of, you know, wherever on this date,
13 and the following people will be present. And I'm happy if
14 you want to put in it that it's conducted pursuant to 408
15 plus, as Mr. Schrock suggested. All for that. But it's
16 going to be short and simple.

17 If that's helpful, great. If it's not helpful,
18 then I got it.

19 MR. SCHROCK: Your Honor, we're happy to put a
20 draft together and, you know, work with the -- with
21 Mr. Hermann and Mr. Greenberg and --

22 THE COURT: Let me ask you this. I mean, you
23 thought you were going to be here all day. I got a spare
24 conference room.

25 MR. SPEAKER: We don't have clients.

1 THE COURT: I'm sorry?

2 MR. SCHROCK: We don't have clients.

3 MR. SPEAKER: They have clients -- no clients.

4 THE COURT: Oh, you don't have clients.

5 MR. SCHROCK: Yeah.

6 THE COURT: Fair enough. No, --

7 MR. SCHROCK: We --

8 THE COURT: I --

9 MR. SCHROCK: The Debtors do, but --

10 THE COURT: No, no, no, I got it, they got to have
11 that conversation.

12 MR. SCHROCK: We -- yeah, we were thinking Monday,
13 you know, likely would be the day that we would set it up.

14 THE COURT: All fine by me.

15 Mr. Hermann.

16 MR. HERMANN: That is fine by me, Your Honor.

17 THE COURT: And can you figure out again --
18 because -- and I'm not trying to get into internal politics.
19 Do you feel comfortable that you can come up with a, you
20 know, the following two or three lawyers and the following
21 three or four business people will attend?

22 MR. HERMANN: Yes, for sure.

23 THE COURT: Okay.

24 MR. HERMANN: Thank you.

25 THE COURT: Oh, I forgot about the Committee. You

1 got your deal. Why do you -- do you care about this?

2 (Laughter)

3 MR. WILSON: Good afternoon, Your Honor. Eric
4 Wilson of Kelley Drye for the Creditors Committee.

5 We got our deal. We've kind of been a fly on the
6 wall. But not knowing where these discussions are headed,
7 it feels like we should have a seat at that table.

8 THE COURT: If you want to go, I mean, to that
9 meeting, I think that the Committee is certainly welcome to
10 go.

11 I would ask that from the Committee's perspective
12 that it be counsel only. And if you need -- you know, if
13 you need to go link up and have a video call with your
14 Committee members, I've been I think in all of your
15 respective offices. I know that you -- I know that they all
16 have great video capability, and I'm sure they would give
17 you some privacy and a link to let you do that.

18 But I'd ask that it be just counsel only because
19 you're really listening and making sure that the dynamics of
20 the deal you cut don't change. Is that unfair?

21 MR. WILSON: That's completely fair. I appreciate
22 that. Thank you.

23 THE COURT: Yes, sir. All right. So with that,
24 anything else we need to talk about?

25 MR. SCHROCK: I think that'll do it, Your Honor.

1 THE COURT: All right. I compliment everybody on
2 the trial. So much fun to have everybody back in the
3 courtroom. It's been so long.

4 I also want to say I very much appreciate your
5 giving the younger lawyers an opportunity to examine
6 witnesses. The witnesses were all substantive. And I say
7 this for everybody because I stood there actually in this
8 courtroom for a long time right there, I know how hard the
9 skillset is to acquire. And the only way you get it is by
10 actually doing it.

11 And, you know, you see, you know, the world moves
12 at a much higher rate of speed when you're standing there
13 than before you come in the door. So I appreciate you
14 giving the youngsters, all of you, the opportunity to work
15 on their respective skillsets.

16 With that, safe travels home. And I'll see you
17 next week or whenever that is.

18 We'll be adjourned.

19 THE CLERK: All rise.

20 (Hearing concluded 1:51 p.m.)
21
22
23
24

25 * * * * *

1 I certify that the foregoing is a correct
2 transcript to the best of my ability due to the condition of
3 the electronic sound recording of the ZOOM/video/telephonic
4 proceedings in the above-entitled matter.

5 /S/ MARY D. HENRY

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